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No. 91-802

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

KESTUTIS EIDUKONIS,

Respondent,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENTAL APPENDIX

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court's finding that Mr. Eidukonis acted reasonably in remaining on military duty on February 18, 1985 was clearly erroneous, where he was ordered by the Army to extend his service for an additional 26 days in order to complete an important project on which he had already been working for 166 days, and which was nearly finished, and where he had given his employer over three months notice of the possibility of this extension.

2. Whether the District Court properly applied the "reasonableness" standard in finding that Mr. Eidukonis's decision to complete his military duty was protected under the Veterans' Reemployment Rights Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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COUNTERSTATEMENT OF THE CASE

Kestutis Eidukonis was hired by SEPTA in 1981 as a Production Control Specialist. In February 1985, the period relevant to this case, there were two other upper level management employees in Eidukonis's department at SEPTA performing the same job duties as Eidukonis.

At the time Mr. Eidukonis applied for his position at SEPTA, he disclosed on his job application that he was a member of the United States Army Reserve. Pet. App.

40. Mr. Eidukonis was a Major in the Reserve assigned as an Individual Ready Reservist. As a reservist, Mr. Eidukonis had the obligation to attend two weeks of annual training, which he served at Fort Monroe, Virginia.

An individual ready reservist must express a willingness to accept annual military duty which exceeds two weeks. In theory, a refusal to participate in any training beyond the annual two-week period will not adversely affect a reservist's good standing. In practice, however, acceptance of a variety of assignments and experiences may enhance a reservist's potential for promotion. Pet. App. 40.

SEPTA provided to its administrative or management employees a handbook, entitled "SEPTA and YOU," which set forth the company's employment policies, including those pertaining to military leave. Pet. App. 40. The SEPTA employee handbook did not contain any written policy limiting the right of an employee to take leave for the performance of military duty. Prior to February 11, 1985, SEPTA had no written employment policy defining the manner in which requests for military leave should be made or limiting the amount of prior notice required or the duration, repetition or timing of leave for reserve duty. In fact, SEPTA had a specific policy, policy instruction number 6.17.1, labeled "Reemployment Rights After Military Training," which unequivocally stated that SEPTA would grant any leave requested for military training.

During the years 1981 through 1984, Mr. Eidukonis took extended military leaves of absence from his employment with SEPTA, lasting in some cases in excess of 140 days pursuant to his commitment as an individual ready reservist for the Army Reserve. Pet. App. 41. It is undisputed that SEPTA consented in writing to each and every one of these military leave requests, irrespective of the amount of notice given or the duration of the leave, without any objection or comment. Pet. App. 41.

In every instance, Mr. Eidukonis followed the same procedure when requesting a leave of absence: he notified his supervisor at SEPTA orally of his military orders and later confirmed the dates of absence from employment in writing by handing his supervisor a form provided by the Army describing the particular tour of duty. Pet. App. 41. SEPTA never questioned this procedure and, in fact, treated it as routine. Mr. Eidukonis never received any warning, criticism, or suggestion from SEPTA that this manner of giving notice was in any way improper or unacceptable. Pet. App. 42.

In the summer of 1984, Army personnel at Fort Indiantown Gap, Pennsylvania identified a critical safety problem involving the firing of artillery rounds, tank rounds and Air Force bombing rounds at the weapons firing ranges located there. The Post Commander at Fort Indiantown Gap, Colonel William D. Harris, was particularly concerned because several soldiers had been injured due to rounds of ammunition falling outside the range area, and general confusion over the use of the range. Major Dwayne C. Stout, Deputy Director of Plans, Training and Security at Fort Indiantown Gap, determined that the safety problem could be cured through the implementation of a computer system for the firing ranges. Major Stout canvassed the possibility of obtaining Mr. Eidukonis to accomplish this project with Lieutenant Colonel Berich, the Reserve Component Advisor to Colonel Harris. Mr. Eidukonis had spent a considerable amount of time the previous summer working with the computer systems at Fort Indiantown Gap and possessed the required computer programming know-how. Based on Mr. Eidukonis's special expertise and familiarity with the systems at Fort Indiantown Gap, and also because of a shortage of available active duty officers, Mr. Eidukonis was specifically selected for the task. Lieutenant Colonel Berich contacted Mr. Eidukonis in Fort Monroe, Virginia, where Mr. Eidukonis was serving his annual two-week training period from

August 13, 1984 to August 26, 1984.[1] Mr. Eidukonis expressed interest in the project, but told Colonel Berich he would have to speak again with his boss at SEPTA first.

On August 15, 1984, orders were issued instructing Mr. Eidukonis to report for active duty at Fort Indiantown Gap, where he was put in charge of developing and implementing a personal computer system for the firing ranges. SEPTA consented in writing to this military tour, which was originally scheduled as a 26-day tour, from September 5, 1984 to September 30, 1984.[2] Pet. App. 42. Near the end of this 26-day period, it became apparent that additional time and training would be required to implement the computers into the range management system. Colonel Harris and Major Stout informed Mr. Eidukonis that he was to remain to finish his work on the computer system. Accordingly, Colonel Harris and Major Stout arranged for Mr. Eidukonis's tour at Fort Indiantown Gap to be extended from October 1, 1984 until February 16, 1985. Mr. Eidukonis immediately telephoned his supervisor at SEPTA, Ollin Boyd, from Fort Indiantown Gap and notified Boyd of this extension. Boyd immediately granted and consented to this additional 140-day leave of absence without criticism, warning or comment. Pet. App. 42. Subsequently, SEPTA consented in writing to this 140-day extension without objection or comment concerning the length of the leave, the timing of the leave, the amount of notice given concerning the leave, or the manner by which Mr. Eidukonis notified SEPTA of this leave.

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1. SEPTA consented in writing to this leave for annual tarining without objection or comment.

2. Prior to accepting this 26-day assignment, Eidukonis conferred with his supervisor at SEPTA, Ollin Boyd, and asked if SEPTA had any objection to his accepting the leave. Boyd voiced no objection, and in fact, expressed his approval in a conversation which took place in early August 1984, before Eidukonis left for Fort Monroe to serve his annual two-week training.

that project in mid-air would have been unfair to his supervisors at Fort Indiantown Gap.

On February 5, 1985, the Army approved Major Stout's request from Fort Indiantown Gap that Mr. Eidukonis's period of active duty be extended for 26 days so that his work on the firing range computer project could be completed. Pet. App. 43. Although the written military orders were issued at the Army Reserve Personnel Center in St. Louis, Missouri on Friday, February 5, 1985, Mr. Eidukonis did not learn that the request had been approved until February 8, 1985.[4] Mr. Eidukonis immediately telephoned Mr. Boyd at SEPTA that same day and informed him that his tour of military service was extended until March 15, 1985. Pet. App. 43. Mr. Eidukonis then asked Boyd's permission to take the 26-day extension and Mr. Boyd consented, assuring Mr. Eidukonis that it was "no problem." Relying on Mr. Boyd's assurance that SEPTA had preapproved this short extension, Mr. Eidukonis contacted his military superiors and informed them that he was able to accept the 26-day extension and complete the important assignment he had nearly finished.

By letter dated February 11, 1985, Mr. Boyd abruptly informed Mr. Eidukonis that if he did not return to work at SEPTA on February 18, 1985, (the first day after his 140-day mission ended) his employment status at SEPTA would be placed in immediate jeopardy. Boyd issued this surprise ultimatum even though SEPTA could have made alternative arrangements to fulfill Mr. Eidukonis's job responsibilities during the period of the short extension.[5]

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4. This was not unusual. In fact, there is often an interval of 60 days or more between the time a reservist first learns that a tour of duty is a possibility and the time the reservist receives his formal orders.

5. SEPTA plainly admitted this at trial. Eidukonis even offered to come in to SEPTA on the weekends to help alleviate any workload burden at SEPTA caused by the 26-day extension. Boyd did not act on Eidukonis's suggestion.

Mr. Eidukonis immediately sought legal advice from Major Dennis Olgin, an attorney and legal officer at Fort Indiantown Gap, to determine how he should respond to this letter. Pet. App. 44. Major Olgin advised Mr. Eidukonis that SEPTA could not terminate his employment because of his compliance with duly received military orders and his failure to report to work on February 18, 1985. Pet. App. 44. Based upon that advice, Mr. Eidukonis did not report for work on February 18, 1985 at SEPTA, but remained at Fort Indiantown Gap in compliance with his military orders and completed his work on the computer systems for the firing ranges.

By letter dated February 20, 1985, SEPTA suspended Mr. Eidukonis from his employment with intent to terminate for his failure to return to work on February 18, 1985. Pet. App. 43. Mr. Eidukonis responded to this letter by referring SEPTA to the United States Department of Labor's Office of Veterans' Reemployment Rights, adding that he hoped the problem could be solved amiably. SEPTA did not contact that office. Instead, on April 13, 1985, SEPTA formally discharged Mr. Eidukonis for his failure to disobey military orders requiring him to remain at Fort Indiantown Gap, rather than return to SEPTA on February 18, 1985. Pet. App. 43.

Eidukonis subsequently brought suit under the Veterans' Reemployment Rights Act, 38 U.S.C. §2021, *et seq.,* seeking restitution of lost wages and employment benefits under §2021(b)(3), and §2024(d) of the Act. On June 3, 1988, the District Court entered a judgment in favor of Eidukonis. SEPTA appealed to the Third Circuit Court of Appeals, which held, in a question of first impression for the Court, that a reservist's request for leave must be reasonable in order to enjoy the protections of the statute. *Eidukonis vs. SEPTA,* 873 F.2d 688, 694 (3rd Cir. 1989). Noting that the District Court may have believed that it was not permissible for it to consider the employer's situation in evaluating reasonableness, the Third Circuit panel, over a dissenting

opinion by Judge Becker, concluded that a standard which evaluates a reservist's request for leave and the employer's response to that request on the basis of reasonableness under all the circumstances is required under §2024(d). *Id.* at 694.

The standard adopted by the Third Circuit allows for the closest possible scrutiny of a reservist's conduct in requesting leave of absence and results in an inquiry in which the employer's needs and the burden on the employer are weighted equally with the reservist's concerns and actions. Unlike the standard adopted by the Eleventh Circuit in *Gulf States Paper Corp. vs. Ingram,* 811 F.2d 1464 (11th Cir. 1987) and the position urged by Judge Becker, in his dissent, Pet. App. 35, the Third Circuit test does not accord a presumption of reasonableness to a reservist's request for leave.

The Third Circuit remanded to the District Court so that it could reconsider the employer's situation in evaluating reasonableness and make such additional findings of fact and conclusions of law as were necessary to accommodate an examination of the reasonableness of the parties under all the circumstances. *Eidukonis,* 873 F.2d at 697. On remand, the District Court again entered judgment in favor of Eidukonis, entering a verdict on February 27, 1991 against SEPTA in the amount of $83,526.29 plus interest computed from June 2, 1988. On remand, the District Court found that while Mr. Eidukonis acted reasonably and in good faith, SEPTA did not. Pet. App. 51. The District Court found that SEPTA violated §2024(d) of the Veterans' Reemployment Rights Act when it terminated Mr. Eidukonis's employment. Pet. App. 50.

SEPTA appealed again, asserting that the District Court's finding that Eidukonis acted reasonably was against the weight of the evidence presented. SEPTA also contended in the second appeal that the District Court's finding that SEPTA acted unreasonably and in bad faith was also against the weight of the evidence. On appeal, the Third Circuit found that the District Court's

findings were not against the weight of the evidence, as the Court affirmed without opinion on August 12, 1991.

SUMMARY OF THE ARGUMENT

The Veterans' Reemployment Rights Act, 38 U.S.C. §2024(d), mandates that leave for reserve duty "shall upon request be granted," and that reservists "shall be permitted to return to [the] position[s] [that they] would have had if [they] had not been absent for such purposes." Despite the clear and unequivocal terms of §2024(d), various courts have engrafted a reasonableness requirement into the statute, holding that a reservist has no right to return to his job unless the requested leave is reasonable.

Of the courts which have adopted a reasonableness standard, the test developed by the Third Circuit in *Eidukonis vs. SEPTA,* 873 F.2d 688, 694 (3rd Cir. 1989), is the broadest standard devised by any Circuit Court. The Third Circuit standard evaluates the reasonableness of an employee's request for leave under all the circumstances. *Id.* at 694. The District Court found, and the Third Circuit affirmed the finding, that Eidukonis acted reasonably and in good faith in remaining on military duty on February 18, 1985, where he was ordered by the Army to extend his service for an additional twenty-six (26) days in order to complete an important project on which he had already been working for 166 days. Pet. App. 44. The Court also found that Eidukonis had given SEPTA over three months notice of the possibility of this extension. Pet. App. 42. Further, SEPTA had not notified him that there were any limits on the amount of leave a reservist could take, and had not given him any warning that he could be terminated because of his leave until after his orders for this assignment had been issued, only one week before the brief twenty-six (26) day extension was to begin. Pet. App. 42-43. The Court also determined that Eidukonis was terminated solely because of the request for military

leave beginning February 18, 1985, not for his conduct relating to any prior or subsequent military leaves or any personal disputes with his supervisors at SEPTA, and not because of the amount of notice he gave SEPTA for any of his military leaves. Pet. App. 43.

The District Court applied the "reasonableness under all the circumstances" test to conclude that Eidukonis acted reasonably in remaining on military duty, and the Third Circuit affirmed this finding. There can be no broader standard that one which permits consideration of all the circumstances. Because the District Court and the Third Circuit have already concluded that Eidukonis acted reasonably under the most comprehensive test, no important purpose is served by the Supreme Court evaluating the same conduct under a narrower or identical standard. Regardless of whether the Supreme Court discards the concept of a reasonableness standard entirely or modifies the standard enunciated by the Third Circuit, the judgment in favor of Eidukonis will stand.

The Supreme Court should not grant certiorari in a case where its resolution of the issues does not make a difference to the outcome of the case. This is especially true because certiorari has been granted and oral argument has already been held in the case of *William "Sky" King vs. St. Vincent Hospital,* No. 90-889. In *King,* the Court is directly confronted with the threshold issue whether §2024(d) of the Act requires a reservist's conduct to be evaluated under a reasonableness standard. That case cannot be resolved without a definitive ruling by the Supreme Court on that issue. This is unlike the scenario presented by the *Eidukonis* case, in which, assuming a reasonableness standard applies, the reservist's conduct has been found reasonable under the broadest test devised and no modification of the standard by the Supreme Court could change the outcome of the case or the finding that Eidukonis acted reasonably. Because certiorari is not a matter of right, but of the

Court's discretion, it should not be granted in these circumstances.

ARGUMENT

I. GRANTING THE WRIT WOULD NOT PROVIDE THE COURT WITH A PROPER CASE TO EVALUATE THE REASONABLENESS STANDARDS, BECAUSE THE THIRD CIRCUIT'S JUDGMENT WILL BE AFFIRMED REGARDLESS OF WHAT STANDARD IS APPLIED

Under Supreme Court Rule 10, a petition for writ of certiorari should only be granted when there are special and important reasons therefore. Underlying this admonition is the presumption that the issues which make a case of sufficient importance to merit Supreme Court review actually need to be decided for the outcome of that case to be finally determined. If the Court's resolution of these issues makes a genuine difference to the decision in the case then before it, there is a proper factual foundation for the Court's analysis and opinion. On the other hand, if the Court's determination of the issues will not matter one way or the other to the outcome of the case, then the Court runs the danger of rendering only an advisory opinion.

It is submitted that the *Eidukonis* case does not provide the Court with the opportunity to define the interpretation and application of §2024(d) in a case where that definition makes any difference to the outcome. There are two ultimate questions concerning the proper interpretation of §2024(d) which require a definitive resolution by the Supreme Court. First, is a reasonableness standard to be applied to a reservist's request for a leave of absence under §2024(d), and, second, if a reasonableness standard applies, what factors are properly considered by the Court in determining whether a particular request for leave was reasonable? Regardless of how these two questions are resolved, under the facts found by the District Court, and the extremely broad

legal standard applied by the Third Circuit, the judgment in *Eidukonis* must be affirmed.

If the Court determines that a reservist's request for leave of absence need not be subjected to a reasonableness test, then there is no need to reach the issue whether Eidukonis acted reasonably with regard to taking military leave. It was not disputed on either appeal in this matter that Eidukonis's requests for leave were covered under the literal terms of the statute, and that without consideration of a reasonableness standard, he was entitled to reemployment by SEPTA upon his return from military duty.

If the Court ultimately decides that a reasonableness standard is appropriate, Eidukonis will be found to have acted reasonably under whatever standard is fashioned by the Court, because his conduct has already been deemed reasonable under the most comprehensive standard devised. Using the "totality of the circumstances" standard created by the Third Circuit in *Eidukonis vs. SEPTA,* 873 F.2d 688 (3rd Cir. 1989) *(Eidukonis I),* the District Court found that Eidukonis acted reasonably and in good faith in accepting the February 18, 1985 twenty-six (26) day extension of his duty and in completing his important assignment at Fort Indiantown Gap. Pet. App. 44. If his conduct has been found reasonable under the Third Circuit's approach, which is the broadest standard devised by any Circuit Court and permits consideration of the largest range of factors, (see discussion *infra* section III), it is extremely doubtful that the same conduct would suddenly become unreasonable when subjected to a curtailed and less rigorous examination. There can be no more expansive criterion than one which permits consideration of all the circumstances. Thus, regardless of whether the Supreme Court discards the concept of a reasonableness standard entirely or modifies the standard enunciated by the Third Circuit, the judgment in favor of Eidukonis will stand.

In contrast, there are two cases presently pending before the Supreme Court which require a definitive

resolution of these issues in order for the cases to be decided. Certiorari has been granted and oral argument has already been held in the case of *William "Sky" King vs. St. Vincent's Hospital,* No. 90-889. In that case, the Eleventh Circuit found that a reasonableness standard applies to a reservist's request for leave of absence under §2024(d) and that a three year leave of absence is *per se* unreasonable. *St. Vincent's Hospital vs. King,* 901 F.2d 1068, 1072 (11th Cir. 1990). In finding that the employee's request for leave was unreasonable, the Eleventh Circuit was guided by the test set forth in *Gulf States Paper Corp. vs. Ingram,* 811 F.2d 1464 (11th Cir. 1987), which judges reasonableness on the basis of three factors: the length of the leave, the employee's actions, and the burden placed on the employer. *Gulf States,* 811 F.2d at 1469. In the *King* appeal, the Solicitor General has argued that an employee's right under §2024(d) to a leave of absence is not conditioned on the reasonableness of the employee's request for leave. St. Vincent's Hospital contends on appeal that a reasonableness test is appropriate.

In *King,* the Court is directly confronted with the threshold issue whether §2024(d) of the Act requires a reservist's conduct to be evaluated under a reasonableness standard. That case cannot be resolved without a definitive ruling by the Supreme Court on that issue. This alone is a special and important reason to grant certiorari, which is not present in the *Eidukonis* case. If the Court finds that a reasonableness test is warranted, it will then evaluate the three factor *Gulf States* test applied by the Eleventh Circuit and determine whether that is the appropriate standard to be used. The *Gulf States* test is significantly narrower than the Third Circuit's "totality of the circumstances" standard, as it accords a presumption of reasonableness to a reservist's request for leave. *Gulf States,* 811 F.2d at 1469. Under the standard applied by the Third Circuit, no presumption of reasonableness attaches to the reservist's conduct.

If the Court finds in the *King* case that no reasonableness requirement applies to a reservist's request for leave, then the Third Circuit's decision in favor of Eidukonis must of necessity be affirmed. If the Court in the *King* case determines that a reasonableness standard applies, then it must articulate what that standard is, in order to determine whether *King's* request for leave of absence was reasonable. Because *King's* request for leave was found unreasonable by the Eleventh Circuit, the Court's discussion and definition of the reasonableness standard will be required to determine the outcome of the case. This is unlike the scenario presented by the *Eidukonis* case, in which the employee's conduct has been found reasonable under the broadest standard devised, without the benefit of a presumption of reasonableness, and the Court's adoption of a different standard would not change the outcome of the case. The *Eidukonis* case, therefore, does not provide the Court with a setting conducive to any meaningful discussion of the issues.

In its petition, SEPTA contends that the *Eidukonis* case would enable the Court to fashion the appropriate reasonableness test. If a reasonableness test applies however, the Court must define the reasonableness test in connection with the *King* case, which is already before the Court. The need for an articulation of the reasonableness standard is therefore no basis for granting the Writ in the instant case.

A petition for certiorari has also been filed in *Kolkhorst vs. Tilghman,* No. 89-1949, which presents the Court with another opportunity to evaluate whether a reasonableness standard is required under §2024(d). In *Kolkhorst vs. Tilghman,* 897 F.2d 1282 (4th Cir. 1990), the Fourth Circuit found that the Baltimore Police Department's policy limiting to 100 the number of police officers, other than new hires, who were allowed to join in active military reserve units violated the non-discriminatory provisions of §2021(b)(3). *Kolkhorst,* 897 F.2d at 1285. The Court also held that the

Police Department's refusal to grant Kolkhorst leave for military reserve training violated §2024(d). *Id.* The Court found that reasonableness is not required under §2024(d), and awarded damages to the reservist. *Id.* *Kolkhorst* presents the Court with another opportunity to address the question whether a reasonableness standard applies to §2024(d), and if so, what factors are to be considered by the Court in determining reasonableness.

The Fourth Circuit in *Kolkhorst* did not articulate its own version of the reasonableness standard. If the Court desires a meaningful factual context against which to present a reasonableness standard, the *Kolkhorst* case presents that opportunity. In contrast, the "totality of the circumstances" test fashioned by the Third Circuit in *Eidukonis* is so broad and permits such a complete evaluation of a reservist's conduct that any standard articulated by the Court could not be more expansive, and thus would not change the outcome of the case or the finding that Eidukonis acted reasonably. Because certiorari is not a matter of right, but of the Court's discretion, it should not be granted in these circumstances.

II. THE ONLY LEAVE REQUEST RELEVANT TO THE COURT'S INQUIRY IS THE FEBRUARY 18, 1985 TO MARCH 15, 1985 EXTENSION OF EIDUKONIS'S TOUR OF DUTY AT FORT INDIANTOWN GAP

In its petition, SEPTA repeatedly urges the Court to consider leave requests prior to and subsequent to the request for which Eidukonis was terminated, the twenty-six (26) day extension of his tour of duty at Fort Indiantown Gap beginning February 18, 1985. *See* SEPTA's Petition at 26, and SEPTA's Questions Presented 1, 2, 4 and 6. Regardless of what legal standard of reasonableness is applied, evidence surrounding other leaves of absence is irrelevant, because SEPTA has admitted that Eidukonis was not terminated for accepting any other leave.

The District Court found that Mr. Eidukonis was terminated by SEPTA solely because of his failure to report back from duty on February 18, 1985.[6] Accordingly, the "employee's request for leave" to be scrutinized from both the employee's and the employer's perspective under a reasonableness standard is the February 18, 1985 to March 15, 1985, 26-day extension of Eidukonis's tour of duty at Fort Indiantown Gap. Any evidence relating to Eidukonis's request for leave to serve the annual two-week training period from March 18, 1985 until March 30, 1985 is irrelevant. As the panel in *Eidukonis I* cogently stated: "(W)e begin with the national importance of reserve status . . . It follows that a request for leave to serve the obligatory two-week training period is *per se* reasonable." *Eidukonis,* 873 F.2d at 695. In its petition, SEPTA does not object to the inclusion of this factor in a reasonableness test. Thus, the District Court's focus on the 26-day request for purposes of applying the reasonableness test was entirely proper. SEPTA's insistence that the District Court erred when failing to take into account the obligatory two-week training period scheduled for March 1985, see Petition of SEPTA at 26, ignores the very first factor pronounced by the Court in *Eidukonis.* For the same reason, evidence relating to the reasonableness of both Mr. Eidukonis's and SEPTA's conduct surrounding the request for the two-week annual training from August 13, 1984 through August 25, 1984 is also not relevant.

The only other leave requests which SEPTA contends should have been evaluated differently by the District Court were the 26-day leave beginning September 5, 1984 and ending October 1, 1984 and the 140-day extension of that leave until February 18, 1985.[7] Re-

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6. SEPTA repeatedly conceded this fact at trial.

7. SEPTA conveniently ignores its prior grants of leave in 1981 (153 days), 1982 (144 days), and 1983 (88 days) and argued on appeal that the relevant events started in May of 1984. The

gardless of what standard is applied, Eidukonis's acceptance of these leaves cannot be considered unreasonable since it is undisputed that SEPTA consented in writing to both the 26-day leave and the 140-day initial extension of that leave. In fact, Ollin Boyd, Eidukonis's supervisor at SEPTA, approved both the leave and the extension in writing on a SEPTA employment/termination form. Pet. App. 42. Ollin Boyd's signature may be found on the employment/termination form specifically approving this leave and 140-day extension, on the line in the space indicated "Department Approval." Both the initial leave and the extension were also approved by an individual in SEPTA's Employee Relations Department. In evaluating the District Court's finding that the February 18, 1985 to March 15, 1985 26-day extension is the relevant leave request to be evaluated under a reasonableness test, this Court is urged to consider that SEPTA approved all requests for military duty falling before that 26-day period in writing and that the only request for leave falling after that time frame was, pursuant to a factor not objected to by SEPTA, *per se* reasonable. SEPTA's suggestion that the District Court should have deemed "unreasonable" leave requests totalling 178 days which were approved by SEPTA in writing reveals the weakness of its overall objection to the District Court's findings.

Having been required to justify its termination of Mr. Eidukonis after the fact, SEPTA of necessity dredges up information relating to previous military leaves dating back to 1981 (all of which were approved by SEPTA in writing), personal differences between Mr. Eidukonis and his SEPTA supervisors, the extent of notice given by Mr. Eidukonis to SEPTA in taking military leaves, and Mr. Eidukonis's personal motives in accepting military orders from the Army. *See* SEPTA's

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significance of these leave requests is that SEPTA consented to every one of them without comment or criticism concerning their duration, timing, or the extent or manner of notice given.

Questions Presented 1, 2 and 4. None of this evidence is relevant, because SEPTA has repeatedly admitted that none of these factors played any part in its decision to terminate Mr. Eidukonis. On the contrary, Mr. Eidukonis was fired solely and exclusively for his refusal to return to work on February 18, 1985. The testimony of the SEPTA supervisor who terminated Mr. Eidukonis, Ollin Boyd, could not have been more clear on this point. At trial, Boyd was asked:

> **MR. BAUER:** Well, whatever the terminology is, sir, there is no question that the reason that Mr. Eidukonis was suspended by you on your letter of February 20th was his refusal to come back to work at the conclusion of 140 day leave on February 18, 1985; isn't that correct?
>
> **THE WITNESS:** Absolutely.
>
> **MR. BAUER:** That is the only reason he was fired; isn't that right?
>
> **THE WITNESS:** Absolutely.
>
> **MR. BAUER:** He was not fired for seeking retribution against SEPTA, was he?
>
> **THE WITNESS:** No. He was fired for failure to follow a directive.
>
> **MR. BAUER:** He was not fired because he had complained to Mr. Bratelli about you?
>
> **THE WITNESS:** He didn't follow a directive.
>
> **MR. BAUER:** And sir, he was not fired because he gave you inadequate notice that he was going to go on the extension of 26 days that commenced on February 18th either, was he?
>
> **THE WITNESS:** I gave Mr. Eidukonis a direct order to return -
>
> **MR. BAUER:** Your Honor. I ask that the witness be asked to answer the question.

Significantly, the District Court found as a fact that Mr. Eidukonis was not fired because of his acceptance of the September 5, 1984 to September 30, 1984 military leave, nor was he fired for his acceptance of the 140-day extension of that military leave from October 1, 1984 to February 16, 1985. Pet. App. 43. Neither was he fired for his acceptance of any previous military leaves. Pet. App. 43. The Court found that Mr. Eidukonis was not fired because of the amount of notice he gave SEPTA for any of his military leaves, nor for the number or length of any military leaves. Pet. App. 43. The Court found that Mr. Eidukonis was not fired because of his job performance, nor because he had filed an internal civil rights complaint, nor because he made derogatory comments about SEPTA supervisors, nor because of his desire for a transfer, and not because he broke any promises about seeking military duty. App. 43. SEPTA did not, and, of course could not, challenge the validity of these factual findings on appeal. Mr. Eidukonis was fired for only one reason: his failure to follow a directive requiring his return to work on February 18, 1985. Boyd's testimony was absolutely unequivocal on this point.

Because Mr. Eidukonis was discharged solely because of his reservist status on February 18, 1985 and not for his conduct relating to any prior or subsequent military leaves or any personal dispute with his supervisors at SEPTA, evidence of such conduct is not relevant to the issue whether he acted reasonably with respect to the request for military leave beginning February 18, 1985, the ultimate issue on the merits in this appeal. For the same reason, in applying the various factors which bear on the reasonableness of the employer's position, evidence which relates to SEPTA's conduct and SEPTA's needs during military leaves other than the February 18, 1985 to March 15, 1985 leave is also irrelevant. Viewed in the context of the evidence pertaining to the only leave request relevant to this case, February 18, 1985 to March 15, 1985, it is apparent that regardless of what legal standard of reasonableness is

applied, Mr. Eidukonis acted reasonably in obeying his military orders requiring him to remain on duty on February 18, 1985.

III. THE DISTRICT COURT PROPERLY APPLIED THE MOST COMPREHENSIVE STANDARD TO FIND THAT EIDUKONIS ACTED REASONABLY

In *Eidukonis I,* the Third Circuit articulated its interpretation of the Veterans' Reemployment Rights Act, 38 U.S.C. §2024(d). In explaining the reasonableness standard which applies to both a reservist's request for military leave and the civilian employer's response to that request, the Third Circuit has developed the broadest and most comprehensive reasonableness test of any Circuit Court. The Third Circuit has identified thirteen specific factors to be applied to the conduct of the parties. The factors to be applied in evaluating the reasonableness of the employee's leave request include: 1) whether the request is for the obligatory two-week training period or during a national emergency (such requests are *per se* reasonable); 2) the employee's ability to schedule the leave at another time; 3) whether the request was to extend a current leave or was for a discrete term; 4) the promptness of the request; 5) whether the employee previously knew that a leave or an extension was a possibility; 6) the employee's bad faith or lack thereof; and 7) whether the employee inquired of a military legal officer and followed the advice given. *Eidukonis,* 873 F.2d at 695-696. The Court also enumerated the following factors which bear on the reasonableness of the employer's conduct in denying a leave request: 1) the employer's special needs for this particular employee; 2) the employer's ability to find a substitute to assume the employee's duties; 3) any special circumstances concerning the workload during the particular period for which leave was requested; 4) the extent of the additional costs incurred by the employer if it were to accommodate the reservist's request; 5) the

clarity with which the employer has informed its employees of its policy on the duration, repetition, timing and notice required for leave for military duty; and 6) whether the employer denies leaves for military duty while allowing them for other purposes.

The Third Circuit noted that these factors were illustrative and not inclusive. *Id.* at 695. The test thus truly allows consideration of "all the circumstances" in that a District Court is permitted to examine other factors it deems relevant to the conduct of the reservist.

The applicable standard in the Eleventh Circuit, developed by the Court in *Gulf States Paper Corp. vs. Ingram,* 811 F.2d 1464 (11th Cir. 1987), rejects a totality of the circumstances test, holding that reasonableness must be judged on the basis of three factors: the length of the leave, the employees actions, and the burden on the employer. *Gulf States,* 811 F.2d at 1469. This standard is considerably narrower than the totality of the circumstances standard of the Third Circuit, in that the *Gulf States,* test accords a presumption of reasonableness to a reservist's request for leave. *Id.* Under the Third Circuit approach, no presumption of reasonableness attaches to the reservist's conduct, and its reasonableness must be evaluated under all the circumstances. *Eidukonis vs. SEPTA,* 873 F.2d 688, 694 (3rd Cir. 1989).

Other circuits have not developed any reasonableness tests which approach the broad standard fashioned by the Third Circuit. *See Kolkhorst vs. Tilghman,* 897 F.2d at 1285-1286 (4th Cir. 1990) (rejecting the concept of a reasonableness test in applying §2024(d); *Boyle vs. Burke,* 925 F.2d 497, 503 (1st Cir. 1991) (declining to decide whether a reasonableness standard is appropriate); and *Sawyer vs. Swift & Co.,* 836 F.2d 1257, 1260 (10th Cir. 1988) (finding that the phrase "upon request" in §2024(d) includes an implicit requirement that the request be made "after proper notice," but declining to identify what other factors may be considered and avoiding the creation of a reasonableness standard). The

seven specific factors identified by the Third Circuit upon which the reasonableness of an employee's request for leave is evaluated allow the most exhaustive examination of a reservist's conduct in taking the leave, and thus provide employers with the greatest amount of protection from unreasonable or bad faith conduct. Even under such scrutiny, the District Court correctly concluded and the Third Circuit affirmed that Eidukonis acted reasonably in remaining on duty on February 18, 1985.

The first factor announced by the Third Circuit asks whether the leave request at issue is for the mandatory annual two-week training period required of all reservists or occurs during a national emergency. It follows that Mr. Eidukonis's request for leave to serve his annual two-week training period from March 18, 1985 until March 30, 1985 was *per se* reasonable, as was his request to serve his mandatory two-week training period from August 13, 1984 to August 26, 1984.

The Third Circuit next allowed that the reasonableness inquiry should not ignore whether the employee had the option of scheduling the military training or duty for a different time. *Eidukonis,* 873 F.2d at 695. In this regard, it would have been unreasonable for Mr. Eidukonis to leave unfinished the project he had been working on for over 140 days. Mr. Eidukonis was in the middle of an important computer project and he testified that to leave that project in midstream would have been unfair to his supervisors at Fort Indiantown Gap. The project involved the safety of the firing ranges, and Mr. Eidukonis testified that he felt that it was his responsibility to complete the project. This case is therefore unlike the factual scenario presented to the Court in *Lee v. City of Pensacola,* 634 F.2d 886, 889 (5th Cir. 1981), where the reservist had other opportunities to complete the six phases of the training course. This case, moreover, does not involve a question of convenience or of deferring a leave until a more appropriate time. This case involves a reservist nearing completion of a vital

mission for which there were no other available or qualified personnel.

At trial, Major Stout, Eidukonis's commander for this project at Fort Indiantown Gap, described the importance of controlling the range's scheduling problems. He also stressed that it was a matter of great urgency, as the base was trying to solve the safety problems before the impending and annual summer reserve training, which always resulted in severe artillery range overcrowding.[8] The record reveals that replacing Mr. Eidukonis at this late juncture would have created significant delays because he was the only person well-acquainted with the project. Major Stout testified that he considered it critical to retain Mr. Eidukonis for the additional 26 days required to complete the project.

This evidence provides abundant support for the District Court's conclusion that Mr. Eidukonis could not reasonably have been expected to reschedule or postpone this tour of duty. Pet. App. 47. In light of the program's nearly-complete status, Eidukonis's integral role, the absence of any other available officer, the military need for prompt completion, and the failure of SEPTA to communicate any particular need of equal importance to Mr. Eidukonis, Mr. Eidukonis did not have a genuine option to reschedule or postpone this brief extension of duty.

The Third Circuit indicated that a relevant factor is whether the leave request is for an extension rather than for a discrete service finite in time and complete in and of itself. *Eidukonis,* 873 F.2d at 695. That a particular tour of duty is extended carries with it the presumption that a military judgment has been made that the military wants this reservist to complete a certain mission before returning to his civilian employer. It is undisputed that Mr. Eidukonis did not solicit this 26-day extension.

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8. Between 170,000 and 200,000 reservists were trained at Fort Indiantown Gap in 1985.

Rather, the military identified a particular need and specifically selected and obtained Mr. Eidukonis to fulfill that need. Colonel Harris and Major Stout ordered Mr. Eidukonis to remain at Fort Indiantown Gap to complete his work on the computer system. Accordingly, Major Stout arranged for Mr. Eidukonis's tour to be extended for 26 days so that his work on the firing range computer project could be completed. The extension request was for a brief period to complete an important military project at the request of Eidukonis's commanding officers. Having been repeatedly granted such leaves for years by SEPTA, it is not surprising that the District Court found Eidukonis's acceptance of this leave reasonable and in good faith. Pet. App. 51.

The Third Circuit stated that a request made as early as possible would be more reasonable than one made at the last minute. *Id.* at 695. The District Court found that the Army's request for Mr. Eidukonis's period of active duty to be extended for an additional 26 days was approved on February 5, 1985. Although the formal military orders were issued at the Army Reserve Personnel Center in St. Louis, Missouri on February 5th, Mr. Eidukonis did not learn that the request had been approved until February 8, 1985. Mr. Eidukonis then immediately telephoned Boyd at SEPTA on February 8th and informed him that his tour of military service was extended to March 15, 1985. Eidukonis's request to accept the 26-day extension was made as early as possible and was patently reasonable.

The Third Circuit also announced that it is relevant whether the employee previously knew that a leave or an extension thereof was a possibility. On October 29, 1984, Mr. Eidukonis informed Boyd that his 140-day period of active duty might be extended. Pet. App. 42. Mr. Eidukonis told Boyd that he was doing vital work for the Army and that he was the only one that the Army felt competent to be placed in such a critical position. Applying this factor, Mr. Eidukonis acted reasonably in

apprising SEPTA of the possibility of the 26-day extension nearly four months before it occurred.

It is also relevant whether the employee inquired of a military legal officer and followed the advice given. The uncontroverted testimony established that on February 11, 1985, when Mr. Eidukonis was first informed by Boyd that he must return to work at SEPTA by February 18, 1985 rather than remaining on military duty, Mr. Eidukonis immediately consulted with Major Dennis Olgin, an attorney and legal officer at Fort Indiantown Gap, to determine whether he could remain there. While the Third Circuit has indicated that this factor alone is not dispositive, it is certainly relevant and provides further support for the District Court's finding that Mr. Eidukonis acted reasonably.

Finally, the Third Circuit stated that an employee's bad faith or lack thereof will be relevant. SEPTA attempts to construct a web of unreasonable conduct by contending that Mr. Eidukonis, apparently in conspiracy with the Army, structured a series of leaves that resulted in his being absent from his employment for an inordinate amount of time. The testimony of Major Burkey, a former Army Reserve Personnel management officer responsible for scheduling the leaves of 1,500 reservists, established that a reservist does not have the ability to unilaterally schedule himself for reserve duty and that no tour of duty is a foregone conclusion until orders are issued. Before Mr. Eidukonis, or any other reservist for that matter, could obtain a leave or an extension, the Army's chain of command would: 1) determine that it required his services for that time frame; 2) approve his leave request; 3) secure the necessary funding for the tour of duty requested; and 4) issue orders in connection with that request.

Major Burkey testified to the process by which an active duty tour is approved. First, the request for leave must be initiated, either by the reservist or by his personnel management officer (PMO). Second, the particular tour is discussed between the reservist and his

PMO so that some rough agreement as to location and dates is explored. Third, the PMO prepares a disposition form, an internal Army document, and forwards it to the training coordinators in the particular training support division. Fourth, once the training coordinator has received the disposition form, the training coordinator is required to call the particular military installation involved and inquire as to whether they are in need of an officer with the background and skill of the particular reservist requesting duty. Fifth, after the training coordinator speaks with officials at the military installation, the training coordinator will, sixth, indicate on the disposition form whether the suggested training is acceptable to the military installation. Seventh, the training coordinator forwards the revised disposition form back to the PMO for his review. Eighth, the PMO will review the disposition form and then contact the reservist and advise him if the tour is available. Ninth, if the tour is available and each of the preceding conditions has occurred, the PMO will then initiate a request for orders, or RFO, for those dates and times at that installation and submit it to the training support division so that formal orders may be arranged. Finally, once the training support division processes the request for orders, it takes another thirty days for the reservist to receive his or her formal orders. SEPTA's misrepresentation of the record in this regard in its petition, suggesting that Mr. Eidukonis could obtain military leaves whenever and wherever he wanted at his whim, should be disregarded.

Under all the circumstances, the District Court did not err in finding that Mr. Eidukonis acted reasonably and in good faith in accepting a brief extension of his military duty in order to complete an important mission on which he had been working for 140 days. If a reasonableness standard is to be applied to requests for leave of absence under §2024(d), then no employer can complain of the Third Circuit's "totality of the circumstances" test, which permits the most extensive inquiry

into a reservist's conduct in requesting leave. There can be no broader standard than one which permits consideration of all the circumstances. Both the District Court and the Third Circuit concluded that Eidukonis acted reasonably under this comprehensive standard. No important purpose is served by the Supreme Court evaluating the same conduct under a narrower or identical standard. Accordingly, the writ of certiorari should not be granted.

CONCLUSION

For all the foregoing reasons, the Petition should be DENIED.

Respectfully submitted,

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DATED: December 11, 1991

SUPPLEMENTAL APPENDIX

Q. Yes. He was not fired for seeking retribution against SEPTA, was he?

A. No. He was fired for failure to follow a directive.

Q. He was not fired because he had complained to Mr. Brattelli about you, was he?

A. Can I give you just one he was fired or do you want to go through all of that?

Q. I will go through all of them and you can just do it once. Now you are getting the hang of it.

A. He didn't follow a directive. I told him, I said, come back to work. I called him, I wrote him, he didn't come back to work, and I fired him.

Q. He wasn't fired. I will go through them all at once.

THE COURT: No, no, don't go through them all. He said he was fired for not following the directive.

MR. BAUER: All right. You get the point.

BY MR. BAUER:

Q. And sir, he was not fired because he gave you inadequate notice that he was going to go on the extension of 26 days that

Excerpt from Court of Appeals Appendix – 266A

Boyd – Direct

commenced on February 18th either, was he?

A. I gave Mr. Eidukonis a direct order to return–

MR. BAUER: Your Honor, I ask that the witness be asked to answer the question.

THE WITNESS: – on the 18th of February and he didn't come back.

THE COURT: Wait a minute. Wait a minute, Mr. Boyd. The question is he was not fired because you got inadequate notice of his plan to take – I guess remain on military leave?

MR. BAUER: For 26 days commencing February 18th.

THE COURT: Answer that question and then you may explain all you want.

THE WITNESS: No.

BY MR. BAUER:

Q. Now, if you would like to make an explanation, you can.

A. No.

Q. All right.

THE COURT: You may explain if you like, Mr. Boyd.

THE WITNESS: I gave Mr. Eidukonis a direct order verbally and I wrote him a letter. I told him to come back to work and he didn't come back to work and I suspended him pending discharge.

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